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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

Appeal From the Supreme Court of California.

RESPONSE TO MOTION TO DISMISS OR AFFIRM.

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Appeal From the Supreme Court of California.

RESPONSE TO MOTION TO DISMISS OR AFFIRM.

Introduction.

Before responding to Appellee's principal legal argument, a few preliminary observations seem in order:

First, it is difficult to reconcile Appellee's present ritualistic disparagement of the importance of the issues at bench with its earlier entreaties to this Court that this case is of such importance as to require advance circulation of drafts of Appellee's written endeavors to other California government counsel to get their comments on this important matter.[1]

[1]On October 22, 1979, Appellee wrote to this Court's Clerk, requesting additional time under Rule 34(5), justifying its request on the basis that ". . . The case is of great interest and importance to other governmental entities of the State of California and appellee desires to forward drafts of its motion to other counsel for review and comment before filing it with this Court."

Second, while Appellee now suggests a supposed lack of exhaustion of administrative remedies below, it fails to inform the Court that since what is in issue here is ". . . widespread and comprehensive zoning modifications . . ." (Motion to Dismiss or Affirm, p. 2[2]), under both California and Federal Constitutional laws that is a legislative not administrative matter (see, *San Diego Bldg. Contractors Assn. v. City Council* (1974) 13 Cal.3d 205, 118 Cal.Rptr. 146, 529 P.2d 570, *City of East Lake v. Forest City Enterprises* (1976) 426 U.S. 668), and no "administrative remedies" are involved (see *infra,* pp. 7-10).

Third, by means of lengthy footnotes, Appellee quarrels with the *factual* adequacy of Appellants' pleadings. Aside from the fact that such quarreling is without merit on its own premise (see fn. 3, *infra*), the short answer is that in the trial court Appellee sought and obtained a ruling sustaining its demurrer to Appellants' cause of action in inverse condemnation without leave to amend even once (a ruling obtainable only when it is clear that no facts can be possibly stated that give rise to a cause of action, the pleading giving rise only to an issue of law). Having thus successfully strived to limit Appellants' complaint to its present form, Appellee is scarcely in a position to scrutinize Appellants' factual pleadings *now,*[3] at the

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[2]Hereafter, cited as "Motion", followed by appropriate page number.

[3]The California courts have had this to say about such arguments:

> "It is unfair for a party to withhold an objection founded upon a defect, which, if pointed out in time, might be remedied, until it is too late to correct the defect, thereby inducing an opponent to rely upon his pleading as sufficient in order that he may have a fatal objection. Such a course is a fraud upon justice and prevents a fair trial. It is therefore not tolerated", *Asnon v. Foley* (1930) 105 Cal. App. 624, 630, quoting with approval from an earlier California Supreme Court decision.

As for this Court, Mr. Justice Holmes put in thus in *Davis v. Wechsler* (1923) 263 U.S. 22, 24:

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

[4]This seems an appropriate place to repeat the admonition of this Court in *U.S. v. Dickinson* (1947) 331 U.S. 745, 748-749:

> ". . . The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate, and when they die." *Id.* at 748.

[5]Two knowledgeable observations on this point warrant repeating. The first, ironically, came from the pen of one of the Justices who concurred in the opinion below:

> "No one ever devised an ordinance to preserve an urban ghetto or crowded central city environment; it is always to protect the outer city, the suburb, the middle or upper

(This footnote is continued on next page)

expense of the *legal issues* they admittedly raise.[4]

Fourth, the impact of the kind of exclusionary zoning involved here on an area's housing opportunities, contrary to Appellee's assertion (Motion, p. 7), figures in the opinion below. In a common sense observation, it was deplored by Mr. Justice Clark in his dissent (Jurisdictional Statement, Appendix A, p. 23). That Appellee would rather ignore this difficult topic, and deal instead with Appellants' arguments in a social, economic and ethical vacuum, is quite understandable from an advocate's tactical point of view, but viewed from a more detached vantage point, no reason appears why this Court which is looked to by the nation to set constitutional policy, should be asked to ignore such important policy factors—to say nothing of palpable reality.[5]

Fifth, contrary to Appellee's assertion (Motion, p. 8), the undisputed facts at bench demonstrate (Jurisdictional Statement, pp. 6-8) that this case *does* involve continuous legislative, regulatory, and acquisitory activity on the part of Appellee, impacting on the subject property, going all the way back to 1967 (Jurisdictional Statement, p. 6). The present action was thus brought only after a half-dozen years of intrusively regulatory and overtly acquisitory interference with the economic utility, value and saleability of the subject property. This is quite typical in California; the forces bent on bringing a brave new world of land regulation to the West Coast have discovered that the most potent weapon is protracted uncertainty, for no rational and prudent person will invest substantial sums without some soundly-based expectation of carrying his project through to completion, and as long as 'studies" are being made and regulations fluctuate, there is nothing for the courts to review, even though the market may be effectively destroyed.

An excellent example of this process is provided by *Arastra Limited Partnership v. City of Palo Alto*

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class housing development." Mosk, *Finding a Direction for Our Environment*, Barrister, Spring 1976, at p. 18.

The second was made by MIT's Urban Studies Professor Frieden in his book "The Environmental Protection Hustle" (1979, MIT Press), in the course of his study of environmentalist practices in Marin County (the area in which the Town of Tiburon is located):

> "Marin County, a wealthy suburb north of San Francisco, is the best place to look for an understanding of what it means to stop suburban growth in the name of environmental protection. It means closing the gates to people who may want to move in and, where possible, even to people who may want to visit; turning to state and federal governments for help in paying the costs of exclusivity; and maintaining a tone of moral righteousness while providing a better living environment for the established residents." *Id.*, p. 37.

(1975, N.D. Cal.) 401 F.Supp. 962, a case quite similar factually to the one at bench (*i.e.*, first municipal studies aimed at acquisition, followed by realization that the municipal acquisitory grasp exceeded its fiscal reach, followed by creation of high sounding "regulations" whose effect was a taking of the right of user, all of which took years before it even reached the level of finality that would permit judicial review; in the meantime, the afflicted landowner was required to bear all the economic burdens of ownership, such as maintenance, insurance, mortgage interest, and of course taxes, but was unable either to put his land to rational uses or to sell it at anything remotely resembling its fair market value). Of course, in *Arastra* there was a liability trial on the merits, and the court was able to make detailed findings;[6] here Appellants were denied a day in court.

Sixth, contrary to Appellee's assertion, Appellants do not contend that the award of just compensation in an inverse condemnation action is, or should be the only remedy. On the contrary, Appellants contend that the error below lies in the California Supreme Court's promulgation of a rigid, absolutist dogma that such remedy can *never* be obtained in cases of regulatory takings. Indeed, Appellants' presentation to this Court is premised on the urgent national need to eluci-

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[6]Aside from thus demonstrating the wisdom of letting such cases go to trial so that the facts may be truly explored on the *ad hoc* basis that this Court continues to favor (*Kaiser Aetna v. United States* (1979) .... U.S. .... (No. 78-738), *Arastra* also demonstrates the wisdom of the monetary remedy. As soon as the District Court spoke in that case, Palo Alto promptly came up with the money with which to purchase the parkland it wanted, whereupon after payment of substantial damages to the landowners, the cause never went to valuation trial, and the above opinion was vacated by stipulation; 417 F.Supp. 1125.

date authoritative criteria as to when such a remedy is appropriate, when it is mandatory, and when it is not available at all (Jurisdictional Statement, pp. 22-25).

Finally, it cannot go without emphatic notice that Appellee's presentation amounts to a studied disregard of the Constitution—both literally and in spirit—and seeks to deal with this case as if it were a matter of state administrative law. It wasn't, and it isn't. To its credit, the California Supreme Court candidly acknowledged that it was deciding a point of *federal constitutional law* (Jurisdictional Statement, Appendix A, pp. 6-8).

The Court below went out of its way to make it clear that it was deciding a constitutional issue of first impression (*Id.* at pp. 8-9); *i.e.,* whether in the face of a well-pled regulatory taking within the meaning of the Fifth Amendment, the constitutionally-mandated remedy of just compensation was or was not available.[7] In today's legal and regulatory climate (see Jurisdictional Statement, pp. 19-20) that is a most important issue, that is ripe for consideration by this Court.

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[7]Contrary to assertions in the Motion, the court below did *not* hold that the facts pled gave rise to no taking. Appellee's argument on this point mistakenly refers to the second holding below, that Appellants' *declaratory relief* count failed because it is available only to test *facial* constitutionality, whereas here the face of the ordinance passed muster (Jurisdictional Statement, Appendix A, pp. 12 et seq.). To the extent the court below dealt with remedies, it did and had to proceed on a premise that a taking had been alleged; otherwise there would be no basis on which to reach the issue of remedies.

I.

The Opinion Below Squarely and Expressly Decides a Federal Constitutional Issue of Prime National Importance, and Expressly Belies Appellee's Arguments Going to Supposed "Administrative Remedies".

The principal thrust of the Motion is the assertion that Appellants should have exhausted their supposed administrative remedies. For several reasons such arguments are without merits, and indeed, take improper liberties with the opinion below.

First, as noted *supra,* extensive area-wide zoning of the type involved here is, under California law, a legislative, not an administrative act. *San Diego Bldg. Contractors Assn. v. City Council, supra;* accord, *City of East Lake v. Forest City Enterprises, supra.* Therefore, inherently there are no "administrative" remedies to exhaust, since no administrative acts are involved. Appellee points to no provisions of the Ordinances involved here, as requiring or providing for any kind of administrative review or relief. Thus, Appellee's reliance on cases in which the legislation in question set up machinery for required administrative review are simply not on point. An individual constitutionally aggrieved by legislation is not required to supplicate the legislature—whether state or local—to change the law, before seeking an appropriate judicial remedy. Indeed, where deprivation of *constitutional* rights is charged, this Court made clear that no pursuit of administrative remedies is required. *Damico v. California* (1967) 389 U.S. 416.[8]

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[8]Of course, *Damico* was an action brought under the Civil Rights Act which is merely a statutorily created remedy for

(This footnote is continued on next page)

Second, where, as here, the governmental acts constituting a taking come about after a lengthy, considered and deliberate course of action, that after extensive studies announces its avowed policy and intent to bring about the very conditions that the aggrieved landowner charges to be a taking, no pursuit of chimerical administrative "remedies" is required, even on Appellee's unsound premise. See *Dahl v. Palo Alto* (1974, N.D. Cal.) 372 F.Supp. 647, 649, *Cordeco Dev. Co. v. Vasquez* (1972, D.P.R.) 354 F.Supp. 1355, 1357-1358, aff'd. (1976, 1st Cir.) 539 F.2d 258.

Finally, and most importantly, the court below made it explicitly clear that no "administrative" remedies are involved here. To the extent Appellee suggests otherwise, its arguments are disingenuous. What Appellee has failed to tell this Court is that when the opinion below was originally written, the California Supreme Court inadvertently referred to the remedy of "adminis-

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deprivation of constitutional rights, that is applicable to regulatory takings. *Lake Country Estates v. Tahoe Regional Planning Agency* (1979) .... U.S. .... [59 L.Ed.2d 401]. Please note that if the label to be applied to such actions (*i.e.,* "civil rights action" vs. "inverse condemnation action") is to be given any *substantive* significance, the obvious response will be to cast one's action in the "civil rights" rubic and take it to the federal courts where the initial pleader gets to control the theory of the case as explained in *Bell v. Hood* (1946) 327 U.S. 678, 681 (". . . The party who brings a suit is master to decide what law he will rely upon. . . ."); *Dahl v. City of Palo Alto* (1974, N.D. Cal.) 372 F.Supp. 647, 649, fn. 2 (Jurisdictional Statement, pp. 25-27).

trative mandamus"[9]—(original opinion below was first printed at 23 Cal.3d 605). However, before that opinion became final, the inadvertence was called to the California Supreme Court's attention and the Court immediately corrected its opinion by striking all references to "administrative" mandamus (a copy of the order below thus correcting the majority opinion is attached hereto as Appendix A). The corrected opinion appears at 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25.

Moreover, it is nothing short of shocking to behold Appellee's argument on this point, because in the court below, Appellee *expressly* requested that the constitutional issue of proper remedy under the taking clause be considered and decided; Appellee's Petition for Hearing in the California Supreme Court concluded as follows:

> "Petitioner further respectfully submits that the effective enforcement of state mandated, and local, land use regulations urgently requires that the uncertainty and confusion created by such cases as *Eldridge* and that now before this Court, be resolved; that the day has arrived when the question raised in footnote 16 of this Court's opinion in *HFH, Ltd.,* ought to be answered." Respond-

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[9]"Administrative mandamus" is the statutory review procedure of *administrative* acts (Cal. Code Civ. Procedure §1094.5). By long standing and well settled California law, this is a remedy limited to judicial review of administrative matters and is not available to review legislative acts. See *Wulzen v. Board of Supervisors* (1894) 101 Cal. 15, 35 P. 353, *Strumsky v. San Diego County etc.* (1974) 11 Cal.3d 28, 35, fn. 2, 112 Cal.Rptr. 805, 809, 520 P.2d 29. For an explication of the California legislative intent in adopting Cal. Code Civ. Proc. §1094.5, see *Brock v. Superior Court* (1952) 109 Cal.App.2d 594, 598-601, 241 P.2d 283.

ent's Petition for a Hearing by the [California] Supreme Court, p. 13, footnote containing the citation to the *HFH* case omitted.[10]

The court below acceded to this request, reached the constitutional issue thus tendered by Appellee (Jurisdictional Statement, Appendix A, pp. 8-9), and decided it on the merits, recognizing in the process that it was dealing with an issue of federal constitutional law (*Id.*, pp. 7 *et seq.*). Yet now, Appellee blandly asserts (Motion, p. 8) that the decision below is ". . . An Application of Established Constitutional Doctrine and Is Not Novel In Any Respect". Appellants respectfully suggest that Appellee's present argument cannot be reconciled with its position below nor, indeed, with the obligation of government counsel to present to the courts "a full and fair record" (see A.B.A. Code of Prof. Responsibility, Canon 7, Ethical Consideration 7-14).

There is simply no "administrative remedies" issue involved here, as the court below made crystal-clear.

The opinion below deals with an important, widespread and vexing constitutional issue that has caused a pervasive split among state courts attempting to select remedies under the Fifth Amendment's taking clause (Jurisdictional Statement, pp. 19-22). The nation needs guidance from this Court, and the instant case provides an appropriate vehicle by which to afford it. Appellee's arguments simply ignore this aspect of the case.

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[10]Footnote 16 in *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 518, 125 Cal.Rptr. 365, 542 P.2d 237, reserved for another day the specific issue of whether an inverse condemnation action lies where a regulation deprives the subject property of substantially all reasonable use.

2.

Appellee's Arguments Ignore the Pervasive Inconsistency in the Law, and Beg the Issue Before the Court: Is Invalidation the Only Remedy in Regulatory Takings?

Appellants have presented the issue of whether the California Supreme Court's absolutist view on remedies available for a taking within the meaning of the Fifth Amendment is consistent with the "just compensation" guarantee. In response, Appellee launches into a lengthy and one-sided "analysis" of the issue which ignores those decisions that do not happen to fit its thesis.[11]

Appellants' short response is that such arguments are more properly made in a brief on the merits. Appellee ignores the importance of the issue on which it prevailed below, and now asserts how it would like this Court to rule on it. But the fact that *some* state courts have ruled on the issue in a manner to Appellees' liking, and that Appellee thinks it can distinguish *some* of the lower court cases that are not to its liking, can hardly obscure the fact that pertinent

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[11]Appellee's intellectual smorgasbord strategy extends to decisions of this Court and the federal courts. Note that the numerous federal court decisions collected at Jurisdictional Statement, p. 26, fn. 18, are simply ignored, while Appellee proceeds to quarrel with the *Benenson* and *Drakes Bay* cases (Motion, pp. 17-18), on which Appellants did not rely. Similarly, this Court's most recent and most definitive decision on remedies for non-physical taking (*i.e., The Regional Rail Reorganization Act Cases* (1974) 419 U.S. 102) is simply ignored, while Appellee goes on at length about the supposed difference between physical and non-physical takings, thereby also ignoring this Court's expression in *U.S. v. General Motors* (1945) 323 U.S. 373, 377-378, and attempting to revive the archaic physical v. non-physical taking dichotomy which has earned for itself a torrent of scholarly criticism (for an excellent collection of such critical commentaries, see Berger, *To Regulate or Not to Regulate — Is That the Question?* 8 Loyola of L.A. L. Rev. 253, 258-259 (1975)).

law is in a state of outright conflict on which the nation urgently needs this Court's definitive guidance.

There may well be *some* factual situations in which invalidation is appropriate, but there are others in which it is idle (particularly as here, where there are acquisitory overtones)[12] or ineffective, or in which the very time-consuming process of establishing the regulations' invalidity works a temporary *de facto* taking (see, *e.g., Keystone Associates v. State* (1972, App.Div.) 333 N.Y.S. 2d 27, aff'd. (1973, N.Y.) 307 NE 2d. 254, *Gordon v. City of Warren* (1978, 6th Cir.) 579 F.2d 386, *Sixth Camden Corp. v. Township of Evesham* (1976, D.N.J.) 420 F.Supp. 709.

The national problems stressed by Appellants (Jurisdictional Statement, pp. 19-22) continue to plague the nation. Since the Jurisdictional Statement was prepared, additional state courts have spoken to the issue of remedies. In *Eck v. City of Bismarck* (1979, N.D.) 283 N.W. 2d 193, the court expressly declined to follow California's absolutist position adopted in the opinion below (283 N.W. 2d at 201), and (while adhering to the view that invalidation is the preferred remedy in ordinary zoning disputes) expressly suggested the availability of inverse condemnation remedies where the ostensible regulation—as here—has acquisitory

[12]Since Appellants did not present here the issue of inverse condemnation liability arising from inequitable precondemnation activities, they do not believe it appropriate to debate it. It must be noted, however, that in launching into this non-issue (Motion, p. 19, fn. 14), Appellee relies on Illinois law (which is contrary to the construction of the Fifth Amendment by this Court—*cf. U.S. v. Reynolds* (1970) 397 U.S. 14, 16—and to the Uniform Relocation Assistance Act which forbids payment of supposed market value which is depressed by precondemnation activities and publicity—see 42 U.S.C. §4651(3)), without making clear to the Court that the Illinois rule constitutes a minuscule minority view.

overtones. Moreover, the North Dakota court properly remanded the cause so that the aggrieved owner confronted with this first-impression decision could amend her pleadings accordingly. Compare the case at bench where the owners were simply denied a day in court.

Also, the Maryland Court of Special Appeals affirmed the award of substantial damages in *Prince Georges County v. Blumberg* (1979) .... A.2d .... (No. 152, September Term 1979, opinion filed November 7, 1979). *Blumberg* illustrates well the abuses to which ostensible regulation can be put, and the damages inflicted thereby, that cannot possibly be rectified by invalidation of the wrongful regulation.

Appellants therefore respectfully urge that precisely because parties claiming to construe the federal Constitution are able on the state of existing law to pick and choose from openly conflicting judicial approaches to the problem of remedies without reliable guidelines promulgated by this Court, the issue of remedies for an uncompensated taking is a most important one, and it warrants consideration on the merits and decision by this Court.

Appellee has simply not addressed the importance of the issues presented here.

Conclusion.

Review on the merits by this Court is urgently needed because the law of remedies is unclear to the point of total lack of guidance. Moreover, if the law of inverse condemnation is to continue along the path laid down by this Court (*i.e.,* on a case by case, *ad hoc* basis), it is no more than compliance with the fundamental notions of fairness enshrined in the

concept of due process that aggrieved property owners be afforded a day in court so that they can fairly present the specific facts of *their* case.

Appellants respectfully pray, that the Motion be denied and that probable jurisdiction be noted.

Respectfully submitted,

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APPENDIX A.

Modification of Opinion. (Filed May 17, 1979)

In the Supreme Court of the State of California.

Donald W. Agins et al., v. City of Tiburon et al., Defendants and Respondents. S.F. 23866 Super. Ct. No. 75873.

BY THE COURT:

The opinion herein, filed March 14, 1979, is modified as follows:

1. On page 1, line 9, delete "administrative" from the phrase "administrative mandamus."

2. On page 8, line 11, delete "administrative" as above.

3. On page 16, line 15, delete "administrative" as above.

4. On page 20, line 3, delete "administrative" as above.